Mewah Plus Property Sdn Bhd v Kluang District Government Servants Co-operative Housing Society Ltd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO J-02-814 OF 1997
GOPAL SRI RAM, NH CHAN AND AHMAD FAIRUZ JJCA
24 JANUARY 2000

Land Law — *Sale of land — Encroachment onto property — Whether amount to 'encumbrances' — Whether refusal to pay balance of purchase price justified — Whether 'encumbrances' means encumbrance in National Land Code 1965 and not merely encroachment — Whether agreement has to be interpreted in accordance with language employed by parties — Whether reference can be made to subsequent conduct of parties*

Under a sale and purchase agreement, the appellant agreed to purchase property belonging to the respondent. Shortly after having entered upon the property, the appellant discovered that there was an encroachment onto the property by the respondent's neighbour. The issue was whether the appellant was entitled to refuse to complete the sale and purchase of the property until the encroachment was removed. In refusing to pay the balance of the purchase price, the appellant relied on two clauses in the sale and purchase agreement which placed upon the vendor the responsibility of removing all 'encumbrances'.

Held, dismissing the appeal:

The word 'encumbrances' in the sale and purchase agreement refers to some impediment in the registered title to the property which prevents the registration of title from the respondent to the appellant. 'Encumbrances' in the context means an encumbrance in the National Land Code 1965 sense and not the encroachment relied upon by the appellant (see pp 459E–F, 460B). The agreement has to be interpreted in accordance with the language employed by the parties to express their intention. Resort should not be had to subsequent conduct to interpret an agreement. The meaning of the term 'encumbrance' cannot, therefore, be given by reference to the subsequent conduct of the parties (see p 460D–F).

[Bahasa Malaysia summary

Di bawah suatu perjanjian jual beli, perayu bersetuju untuk membeli hartanah milik responden. Selepas memasuki tanah tersebut, perayu telah mendapat tahu bahawa terdapat pencerobohan ke atas hartanah oleh jiran responden. Isu adalah sama ada perayu berhak untuk enggan menyempurnakan perjanjian jual beli hartanah tersebut sehingga pencerobohan diketepikan. Sebagai alasan untuk enggan

membayar baki harga belian, perayu telah bergantung kepada dua fasal di dalam perjanjian jual beli yang meletakkan kewajipan di atas penjual untuk mengalihkan semua 'bebanan-bebanan'.

Diputuskan, menolak rayuan tersebut:

Perkataan 'bebanan-bebanan' di dalam perjanjian jual beli merujuk kepada halangan di dalam hak milik berdaftar kepada hartanah tersebut yang menghalang pendaftaran hak milik daripada responden kepada perayu. 'Bebanan-bebanan' di dalam konteks bermaksud halangan di dalam maksud Kanun Tanah Negara 1965 dan bukan pencerobohan yang digantung harap oleh perayu-perayu (lihat ms 459E–F, 460B). Perjanjian tersebut mestilah ditafsirkan menurut bahasa yang digunakan oleh pihak-pihak untuk menyatakan niat mereka. Rujukan tidak patut dibuat kepada tindakan terkemudian untuk menafsirkan perjanjian tersebut. Maksud terma 'bebanan' tidak, oleh itu, diberikan dengan merujuk kepada tindakan terkemudian pihak-pihak (lihat ms 460D–F).]

Notes

For a case on sale of land generally, see 8 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 2833–3271.

Cases referred to

Associated Japanese Bank (International) Ltd v Credit du Nord Sa [1988] 3 All ER 902 (refd)
Haji Hasnan v Tan Ah Kian [1963] MLJ 175 (refd)
Letchumanan Chettiar v Palaniappa Chettiar [1983] 1 MLJ 6 (refd)
Schuler AG v Wickman Machine Tool Sales Ltd [1974] AC 235 (refd)
T Damodaran v Choe Kuan Him [1979] 2 MLJ 267 (refd)
Tan Ah Kian v Haji Hasnan [1962] MLJ 400 (refd)
Wong Kup Sing v Jeram Rubber Estates Ltd [1969] 1 MLJ 245 (refd)

Hilary D'Cruz (*KK Low* with him) (*Low & Lee*) for the appellant.
Phang Weei Min (*Gurucharan Singh* with him) (*Gurcharanpal Singh & Co*) for the respondent.

Gopal Sri Ram JCA (delivering oral judgment of the court): This appeal raises, in our judgment, no matter of principle. It merely concerns a question of construction and the event of this appeal lies on the meaning to be assigned to the terms of an agreement for the sale and purchase of certain property.

The agreement in question is dated 11 July 1994. Under the agreement, the appellant agreed to purchase the respondent's property held under Grant No 8150, for Lot 2047, in the Mukim of Kluang, in area 6a 1r 18p ('the property') for a sum of RM1,108,732.50. A deposit of 10% was paid

upon the execution of the said agreement. Simultaneously with the execution of the said agreement, the respondent gave to the appellant a power of attorney also dated 11 July 1994. The purpose of the power of attorney was to entitle the appellant to enter upon the said property and commence earth works as well as to apply for various approvals to convert the said property from agriculture to residential tenure. It may be added in parenthesis that the appellant wanted to acquire the said property for the purpose of developing it into a housing estate.

Shortly after having entered upon the said property, the appellant discovered that there was an encroachment. It was the respondent's neighbour who had encroached onto the said property. The appellant took the position that the sale could not be completed and that it need not pay the balance of purchase price until the encroachment was removed. In adopting this stand, the appellant relied on the clause in the agreement that required the delivery of vacant possession. It may be added that under the terms, the balance of purchase price was payable on 2 October 1994 with a provision for extension on payment of interest at the rate of 10% per annum.

The respondent did not accept the position asserted by the appellant. It took the view that it could complete the sale and purchase of the subject property by delivering vacant possession. It said so in contemporaneous correspondence.

Despite the time limit imposed by the agreement, neither side insisted on its due performance. Time was therefore allowed to pass. Time was therefore no longer of the essence (see *Wong Kup Sing v Jeram Rubber Estates Ltd* [1969] 1 MLJ 245). Then, on 3 November 1995, the respondent's solicitors wrote to the appellant's then solicitors a letter which contained the following paragraph:

> As the matter is long overdue, we are instructed by our client to give you a month from the date of receipt of this letter to pay the balance of the purchase price failing which (and time shall be of the essence) our client shall terminate the sale and purchase agreement and forfeit the deposit sum paid.

In my judgment, the paragraph I just quoted constitutes sufficient notice to the appellant to perform its obligation to pay the balance of the purchase price. See *Tan Ah Kian v Haji Hasnan* [1962] MLJ 400 affirmed in [1963] MLJ 175.

Despite of the passing of time specified in the paragraph quoted above, the appellant did not pay. In support of his argument that the appellant was under no obligation to pay the balance of purchase price until the said encroachment was removed, Mr Hilrary D'Cruz of counsel for the appellant drew our attention to and relied on two clauses in the sale and purchase agreement. These read as follows:

> Clause 9
>
> The Vendor/s shall secure the removal of all encumbrances (if any) and the discharge of all existing charge/s from the existing chargee/s described in s 13 of the schedule hereto and or other charge/s(if any) at his/their own expense

A and costs over the said property through his/their Solicitors on or before the Date of Completion and the Vendor/s hereby authorizes his solicitors and/or the purchaser/s solicitors to utilize such part as shall be required from the purchase price paid by the purchaser/s as redemption money for discharging the said charge/s over the said property. The redemption sum paid shall be treated as and deemed to be payment towards account of the purchase price.

B Clause 10

In the event that the vendor/s fail/s and or neglect/s to remove the said encumbrances or if after the date of completion the memorandum of transfer cannot be registered in favour of the purchaser/s and or his/their nominee/s or assign/s free from encumbrances for any reason whatsoever the vendor/s shall at the request of the purchaser/s and/or his/their/ nominee/s or assign/s C forthwith refund and return all sums accepted and received by the vendor/s towards the purchase price together with the further sum stated in s 12 of the schedule hereto as liquidated damages whereupon this agreement shall be treated as terminated but without prejudice to the right of the purchaser/s and or his/their/nominee/s or assign/s to take steps to remove such encumbrances and to be reimbursed in respect of the expenses reasonably incurred by him/ D them.

The substance of the argument for the appellant turns upon the meaning to be given to the expression 'encumbrances' appearing in the foregoing two clauses. Mr D'Cruz has argued that it includes the encroachment that was allegedly found to exist in the present case.

E With due respect to counsel for the appellant, we are unable to agree with his argument. In our judgment, the word 'encumbrances' in the two clauses already quoted refers to some impediment in the registered title to the said property which prevents the registration of title from the respondent to the appellant. As was pointed out to counsel during F argument, 'encumbrances' in the context of the agreement in question means an encumbrance in the National Land Code sense. As to what amounts to an encumbrance in the context of the National Land Code, reference may be usefully made to two decisions of the Privy Council on the point.

G The first is *T Damodaran v Choe Kuan Him* [1979] 2 MLJ 267, where Lord Diplock when delivering the advice of the Board said (at p 269):

> In the National Land Code, it is s 340 that expressly provides that the title of a person registered as proprietor of any land shall be indefeasible. The only exceptions are where there has been fraud, misrepresentation, forgery or an *ultra vires* acquisition purporting to have been made under statutory authority. H None of these exceptions apply to the instant case. Interests in land, short of proprietorship, which are capable of being registered are leases, charges and easements. *If registered they would amount to encumbrances within the meaning of a covenant against encumbrances*; but unless registered, they do not derogate from the unencumbered title of the registered proprietor of the land. Claims to be entitled to the proprietorship of land or a registrable interest in land, whether or not they are the subject of litigation, are not registrable as I encumbrances on a registered title. Instead they are protected by the system of private caveats which, while leaving the registered title unqualified and intact, have the effect of preventing any dealing with it by the registered

> proprietor so long as the caveat remains in force; that is, until it is removed from the register. The way in which this system of protection operates was dealt with by their Lordships in the recent case of *Eng Mee Yong & Ors v V Letchumanan* [1979] 2 MLJ 212, to which reference may conveniently be made.

The second is *Letchumanan Chettiar v Palaniappa Chettiar* [1983] 1 MLJ 6, where (at p 9) Lord Templeman referred to a caveat upon the register as 'the only relevant encumbrance', thereby rendering a wider meaning to that expression than that given it by Lord Diplock in *T Damodaran v Choe Kuan Him*.

The encroachment relied upon by the appellant in the present instance is not an encumbrance envisaged by the parties in the sale and purchase agreement. It follows that the parties when making their agreement did not make any provision for an encroachment on the said property.

It was not the appellant's case in the court below that a term ought to be implied that the obligation to pay was to be suspended until removal of the encroachment. In the absence of a pleaded case to that effect, it is not the function of the court to imply such a term. See *Associated Japanese Bank (International) Ltd v Credit du Nord Sa* [1988] 3 All ER 902.

Mr D'Cruz responded by suggesting that the meaning which should be given to the term 'encrumbrance' by reference to the subsequent conduct of the parties. He has referred to the correspondence passing between the appellant's and the respondent's solicitors after the execution of the agreement. He says that if one should look at the correspondence one can see that the expression 'encumbrance' includes 'encroachment'.

The short answer to this submission is that the agreement has to be interpreted in accordance with the language employed by the parties to express their intention. Resort should not be had to subsequent conduct to interpret an agreement. Were it otherwise, an agreement would mean one thing today and another thing tomorrow. In support of this view, we rely on *Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235, where Lord Wilberforce said (at p 261):

> The first qualification involves the legal question whether this agreement may be construed in the light of certain allegedly relevant subsequent actions by the parties. Consideration of such actions undoubtedly influenced the majority of the Court of Appeal to decide, as they did, in the respondent's favour: and it is suggested, with much force, that, but for this, Edmund Davies LJ would have decided the case the other way. In my opinion, subsequent actions ought not to have been taken into account. The general rule is that extrinsic evidence is not admissible for the construction of a written contract; the parties' intentions must be ascertained, on legal principles of construction, from the words they have used. It is one and the same principle which excludes evidence of statements, or actions, during negotiations, at the time of the contract, or subsequent to the contract, any of which to the lay mind might at first sight seem to be proper to receive. As to statements during negotiations this, House has affirmed the rule of exclusion in *Prenn v Simmonds* [1971] 1 WLR 1381 as to the subsequent actions (unless evidencing a new agreement or as the basis of estoppel) in *Whitworth Street Estates (Manchester) Ltd v James Miller & Partners Ltd* [1970] AC 583.

In a latter passage, Lord Wilberforce reiterated the position (at p 262):

> In my opinion, therefore, the subsequent actings relied upon should have been left entirely out of account: in saying this, I must not be taken to agree that the particular actings relied on are of any assistance whatever towards one or other construction of the contract. Indeed if one were to pursue the matter, the facts of the present case would be found to illustrate, rather vividly, the dangers inherent in entertaining this class of evidence at all.

The learned judge in the present case came to the conclusion that there was no breach of the agreement on the part of the respondent. In doing so, he accepted that vacant possession had been given and that the encroachment complained of was no impediment to completion. Mr D'Cruz said that the learned judge was wrong because he preferred the evidence of the respondent without giving reasons for the choice he made. In our judgment, a trial judge is entitled to accept evidence adduced by one party in preference to another party. And no duty is cast upon a trial judge to give reasons for his preference especially in a case which turns upon opinion evidence.

In this case, the learned judge did not err in arriving in his conclusion. He was entitled to express his view on the evidence given by a party to the proceedings. At the end of the day, whether the appellant is entitled to withhold payment of the balance of purchase price depends upon whether that obligation hinged upon the performance of some other obligation on the part of the respondent. We find no such provision in the agreement which imposes an obligation upon the respondent the non-performance of which excuses the payment of balance of purchase price in the context of arguments advanced by the appellant in this appeal. Put in another way, the appellant's failure to pay the balance of purchase price after having received the respondent's notice constituted a breach of the contract. In an action for specific performance, it is a defence to say that the plaintiff (the appellant in the present instance) was himself in breach.

Since the appellant did not perform the fundamental terms of the contract, the learned judge was entitled to refuse specific performance. We therefore affirm the reasons and order made by the learned judge.

The appellant must pay the costs of this appeal. The deposit paid into court shall go to the respondent to account of its taxed costs.

Appeal dismissed.

Reported by Joel Ng